NG KIM MOI & ORS

v.

PENTADBIR TANAH DAERAH, SEREMBAN, NEGERI SEMBILAN DARUL KHUSUS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: N-01-34-1996]
7 MAY 2004

LAND LAW: *Acquisition of land - Legality of acquisition - Non-compliance of Forms A, B, D, E & F prescribed by Land Acquisition Act 1960 - Whether acquisition rendered null and void - Land Acquisition Act 1960, ss. 4, 8, 11, 53, 56 - Federal Constitution, s. 13(1)*

This was the appellants' appeal against the decision of the learned judge dismissing their originating summons, *inter alia*, to declare the acquisition of their land ('the land') by the state government under the Land Acquisition Act 1960 ('the Act') null and void. The appellants claimed that Forms A and B prescribed by the Act were never issued and that Forms D, E and F though issued were not served.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA (dissenting):

[1] The object or purpose of the Act is to empower the State to deprive an owner of his immovable property in exchange for fair and reasonable compensation. There is no right vested in an owner to a pre-acquisition hearing. However, there is a right to be heard at an inquiry by the Land Administrator with regard to the quantum of the compensation that is to be awarded. Since it is statute that is aimed at deprivation of property, courts require the acquiring authority to act strictly in accordance with the terms of the Act. The word "shall" in s. 4(1) of the Act when read, as a whole, is mandatory and not merely directive in effect. The omission to issue Form A amounted to a clear violation of the mandatory provisions of s. 4(1) of the Act. Form D issued under s. 8 of the Act is a critical document because it is the declaration that the relevant land is needed by the State. Authorities have shown that the non-observance of s. 8 of the Act is a serious matter. (pp 144 f-h, 145 h & 146 a-c)

[2] There was simply no service of Forms D, E and F on the appellants as the appellants lived at an address along Jalan Kelang Lama in Kuala Lumpur whilst the said forms were sent to the Land Administrator in Kelang who returned them not served. Therefore, the pre-conditions set by s. 53(2) of the Act were absent. Section 56 of the Act was inapplicable. It was directed at a situation where there was service but not "due service", *ie*, service in the exact terms as prescribed by s. 53. In the present case, there was no service at all. (pp 147 b & 148 c)

[3] The facts showed that the acquisition was wholly invalid. However, as the land was acquired *bona fide* by third parties, it would be practically unjust to set aside the acquisition. There was also no statutory authorisation empowering the court to award damages where an acquisition was in violation of its provisions. If the appellants were to recover damages in common law, their remedy lay in the tort of misfeasance by a public officer in the discharge of his public duties. However, they did not frame their case as such. Nevertheless, the court was empowered under s. 69(4) of the Courts of Judicature Act 1964 to prevent injustice by acting under the prayer for further or other relief. Hence, as the appellants were deprived of their land in violation of the provisions of the Act thereby contravening art. 13(1) of the Federal Constitution, they were entitled to recover from the respondent reasonable compensation for the violation of their fundamental right guaranteed by the said article. (pp 148 d, 149 b, d-e, 150 a, 151 h, 152 a-b & 159 c)

[4] The Act is a statute aimed at the prevention of arbitrary escheatment of proprietary rights, the protection of which the supreme law of the Federation guarantees as a fundamental right. To read mandatory provisions in such a statute in a generous and favourable manner towards those whose duty is to ensure due observance of the statute is to condone and promote maladministration in a matter so important as the deprivation of property. (p 160 f)

[5] The Act does not state that an acquisition may only be attacked for breach of its terms upon proof of bad faith. The statutory provision dealt with herein was mandatory in terms designed to be consonant with a constitutionally guaranteed fundamental right. If the victim of a constitutional violation is required to prove that the contravening public authority acted in bad faith, then the right calling for protection will be illusory. (p 161 a-b)

[6] There is no added burden on a property owner to show that he has suffered prejudice in addition to establishing a breach of a mandatory provision of the Act. In any event, breach of s. 11(1) of the Act in itself was prejudice. Further, at the hearing before the High Court short shrift was made of the appellants' complaint. The appellants' originating summons was called up on short notice. There was also insufficient time given to the appellants to prepare their case. It was difficult to envisage a graver prejudice. (p 161 f-g)

Per Abdul Aziz Mohamad JCA (majority):

[1] No issue should be taken about Forms B and F. It was not mandatory that Form B need be issued and that Form F need be served on the appellants. Form B is a written authority under s. 5(1) of the Act by which the State Director of Land and Mines "may … authorize" certain persons to enter upon certain lands and do certain work. There may not be any necessity to do such work, in which case no entry upon the land is necessary and no written authority need be issued. The Land Administrator, by virtue of Form F under s. 11(2) of the Act, requires the registered proprietor of any land to be acquired, or any other knowledgeable person, to furnish in writing certain information. However, the Land Administrator need not require any of those persons to furnish any information because he may not need it or he has already got it. This was because the words of the section are "may … require". (pp 162 h & 163 a)

[2] At the stage when a Form A notification under s. 4(1) of the Act is published, there is no decision that any land is specifically needed. It is only a tentative stage. The lands are specifically identified only when a declaration to that effect is made in Form D under ss. 7 and 8 of the Act. Such a declaration in the present case was gazetted on 18 March 1993. Therefore the publication of a Form A notification cannot be mandatory. Form A is for the benefit of the acquiring authority to enter the land affected by the notification and undertake survey operations. If the notification is not published the acquiring authority will be deprived of the power to have survey operations carried out in the land. However, they may not need to carry out such survey operations. They may be able to decide exactly which lands are needed and that they are suitable without needing to carry out such survey operations. (pp 163 c-h & 164 a-e)

[2a] Where the market value of the relevant land is concerned, it is as at the date where a Form A notification and/or a Form D declaration is published in the gazette. The notification in Form A lapses after 12 months and if no publication of a Form D declaration is made within that period, the publication of the Form A notification, in such circumstances, will be in vain. The words "in other cases" provided by the First Schedule to the Act should cover situations where the Form A lapses or where it is not published. The market value will then be as at the date the Form D declaration is published in the gazette. Hence it follows that the Act by implication does not intend that a Form A notification be mandatory. (pp 164 f-h & 165 a-b)

[2b] Until and unless the state authority is satisfied that any land in any locality in the state is likely to be needed, there is no obligation to publish the Form A notification under s. 4(1) of the Act. Further, when the state authority decides that the relevant lands are required, a Form D declaration will follow to that effect. Therefore, the publication of a Form A notification cannot be mandatory. Hence, the failure to publish the Form A notification in the present case did not render the acquisition proceedings null and void. (pp 165 c-h & 166 a-d)

[3] There was a failure to serve Form E on the appellants as required by s. 11(1) of the Act. It was due to the failure to notice that the address for service was in Kuala Lumpur and not in Kelang. There was also a failure to understand sub-s. 2 of s. 53 of the Act. Further, the purported service by the notice server was questionable. However, there was no bad faith. There was no intention to hold an inquiry without giving the appellants a right to be heard. The postponements given to the appellants to prepare their valuation report proved the contrary. In addition, the appellants were not prejudiced nor was there any form of injustice to them as they knew of the date of inquiry and it was conducted in their presence. In the circumstances, without resorting to s. 56 of the Act, the failure to serve Form E should not nullify the inquiry. (pp 169 e-i, 170 a-h & 171 a-c)

Per Azmel Maamor J (majority)

[1] There was no actual prejudice caused to the appellants. They were not deprived from attending the hearing before the Assistant Land Administrator. They were present and/or represented by their counsel. In fact, they were given the opportunity to submit their valuation report and they chose not to produce it. Also, the appellants were not deprived of any compensation and there was no evidence tendered to show that the

compensation awarded to them was less favourable than their neighbouring landowners. The appellants' presence at the hearing had nullified any irregularities that might have existed before that. (pp 171 e-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim kerana menolak saman pemula mereka yang antara lain memohon perisytiharan bahawa pengambilan tanah mereka ('tanah') oleh Kerajaan Negeri di bawah Akta Pengambilan Tanah 1960 ('Akta') adalah tak sah dan batal. Perayu mengatakan bahawa Borang A dan Borang B seperti yang ditentukan oleh Akta telah tidak dikeluarkan, dan bahawa Borang D, E dan F, walaupun dikeluarkan, telah tidak diserah kepada mereka.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR (menentang):

[1] Objek atau tujuan Akta adalah untuk memberi kuasa kepada Negeri untuk mengambil harta tak alih pemilik hartanah dengan ganjaran pampasan yang adil dan munasabah. Tidak ada hak diberikan kepada pemilik untuk didengar di peringkat pra-pengambilan. Walaupun begitu, wujud hak untuk didengar sewaktu penyiasatan oleh Pentadbir Tanah berkaitan dengan jumlah pampasan yang akan diberi. Oleh kerana pengambilan tanah dikehendaki oleh statut, maka mahkamah mengkendaki pihak berkuasa yang mengambil supaya bertindak secara yang amat mematuhi terma-terma Akta. Perkataan "shall" di dalam s. 4(1) Akta, apabila dibaca secara menyeluruh, adalah mandatori dan bukan semata-mata suatu arahan. Kegagalan mengeluarkan Borang A adalah suatu ketidakpatuhan terhadap peruntukan mandatori s. 4(1) Akta. Borang D yang dikeluarkan di bawah s. 8 Akta adalah satu dokumen yang kritikal oleh kerana ianya adalah suatu deklarasi bahawa tanah berkenaan adalah diperlukan oleh Negeri. Autoriti-autoriti menunjukkan bahawa ketidakpatuhan kepada s. 8 adalah satu perkara serius.

[2] Borang D, E dan F sememangnya tidak diserahkan kepada perayu oleh kerana perayu tinggal di alamat di Jalan Kelang Lama di Kuala Lumpur sementara borang-borang tersebut telah dihantar kepada Pentadbir Tanah Kelang yang mengembalikannya tanpa serahan. Oleh itu, pra-syarat yang ditetapkan oleh s. 53(2) Akta tidak dipenuhi. Seksyen 56 Akta adalah tidak terpakai. Ia ditujukan kepada situasi di mana serahan telah dibuat tetapi bukan "serahan yang sewajarnya", yakni serahan yang mematuhi sepenuhnya terma-terma di dalam s. 53. Dalam kes semasa, serahan langsung tidak wujud.

[3] Fakta menunjukkan bahawa pengambilan adalah keseluruhannya tidak sah. Bagaimanapun, oleh kerana tanah telah diambil secara *bona fide* oleh pihak ketiga, adalah secara praktikalnya tidak adil untuk membatalkan terus pengambilan. Juga tidak terdapat apa-apa kebenaran statutori yang mengizinkan mahkamah memberi gantirugi di mana pengambilan adalah bertentangan dengan peruntukan-peruntukan. Jikapun perayu boleh mendapat gantirugi di sisi common law, remedi mereka adalah pada kesalahan tort misfeasans oleh pegawai awam semasa menjalankan tugas-tugas awamnya. Walau bagaimanapun, mahkamah diberi kuasa di bawah s. 69(4) Akta Mahkamah Kehakiman 1964 untuk menghalang ketidakadilan dengan bertindak berdasarkan permohonan untuk relif-relif lain. Oleh yang demikian, oleh kerana tanah perayu telah diambil secara yang menyalahi peruntukan Akta sekaligus menyalahi per. 13(1) Perlembagaan Persekutuan, mereka berhak mendapat pampasan yang munasabah dari responden atas pelanggaran hak-hak asasi mereka yang dijamin oleh fasal tersebut.

[4] Akta adalah satu statut yang bertujuan untuk menghalang sebarang penyingkiran hak-hak pemilikan secara sebelah pihak, yang mana perlindungannya telah dijamin oleh undang-undang tertinggi Persekutuan sebagai satu hak asasi. Membaca peruntukan-peruntukan mandatori kepada statut sedemikian secara longgar dan berpihak kepada mereka yang dipertanggungjawabkan untuk memastikan kepatuhan kepada statut tersebut, samalah seperti melindung dan mempromosi perbuatan salahtadbir dalam hal yang sangat penting seperti pengambilan hartanah.

[5] Akta tidak menyatakan bahawa sesuatu pengambilan itu boleh ditentang atas alasan pelanggaran terma-termanya hanya jika terdapat bukti niat jahat. Peruntukan-peruntukan statutori yang diperkatakan di sini adalah bersifat mandatori dan telah diselaras dengan hak-hak asasi yang dijamin di sisi perlembagaan. Sekiranya seorang mangsa kepada suatu pelanggaran perlembagaan dikehendaki untuk membuktikan niat jahat di sisi pihak berkuasa yang melanggar peruntukan, maka hak untuk menuntut perlindungan akan menjadi ilusi semata-mata.

[6] Tidak ada kewajipan tambahan atas pemilik tanah untuk menunjukkan bahawa beliau telah menanggung prejudis selain dari membuktikan pelanggaran peruntukan mandatori Akta. Walau apapun, pelanggaran s. 11(1) Akta dengan sendirinya adalah suatu prejudis. Selain itu, semasa perbicaraan di Mahkamah Tinggi, bantahan-bantahan perayu telah tidak berapa diendahkan. Saman pemula perayu juga hanya dipanggil atas notis yang pendek. Perayu juga tidak diberikan masa secukupnya untuk menyediakan kes mereka. Adalah sukar untuk membayangkan prejudis yang lebih memudaratkan dari ini.

Oleh Abdul Aziz Mohamad HMR (majoriti):

[1] Borang B dan F tidak harus menjadi isu. Bukanlah sesuatu yang wajib bahawa Borang B perlu dikeluarkan dan bahawa Borang F perlu diserahkan ke atas perayu. Borang B adalah satu kebenaran bertulis di bawah s. 5(1) Akta melalui mana Pengarah Tanah dan Galian Negeri "boleh ... membenarkan" orang-orang tertentu untuk memasuki tanah-tanah tertentu untuk membuat kerja-kerja tertentu. Mungkin tidak wujud keperluan untuk membuat kerja-kerja tersebut, yang bererti tidak wujud keperluan untuk memasuki tanah dan kebenaran juga tidak perlu diberi. Pentadbir Tanah, berdasarkan Borang F di bawah s. 112 Akta, memerlukan supaya seorang pemilik berdaftar mana-mana tanah yang hendak diambil, ataupun mana-mana orang lain yang berpengetahuan, untuk mengemukakan kepadanya maklumat-maklumat tertentu secara bertulis. Bagaimanapun, Pentadbir Tanah mungkin tidak memerlukan mereka ini mengemukakan maklumat tersebut oleh kerana beliau tidak memerlukannya ataupun sudah memiliki maklumat-maklumat itu. Ini kerana istilah yang digunakan oleh seksyen adalah "mungkin ... memerlukan".

[2] Di peringkat di mana Borang A di bawah s. 4(1) Akta disiarkan, tidak terdapat keputusan bahawa mana-mana tanah adalah diperlukan secara khusus. Ianya adalah satu peringkat tentatif. Tanah-tanah hanya dikenalpasti secara khusus apabila perisytiharan mengenainya dibuat dalam Borang D di bawah ss. 7 dan 8 Akta. Perisytiharan sedemikian dalam kes ini telah digazet pada 18 Mac 1993. Oleh yang demikian, penyiaran pemberitahuan Borang A tidak boleh menjadi mandatori. Borang A adalah untuk manfaat pihak berkuasa pengambilan untuk memasuki tanah tersebut melalui pemberitahuan untuk memulakan operasi pengukuran. Jika pemberitahuan tidak disiarkan pihak berkuasa pengambilan tidak ada kuasa untuk menjalankan operasi pengukuran di tanah tersebut. Walaupun begitu, mereka mungkin tidak perlu menjalankan operasi pengukuran berkenaan. Mereka mungkin boleh memutuskan dengan tepat akan tanah-tanah yang hendak diambil tanpa perlu menjalankan operasi pengukuran.

[2a] Berkenaan harga pasaran tanah berkaitan, ianya ditentukan pada tarikh pemberitahuan Borang A dan/atau deklarasi Borang D disiarkan di dalam gazet. Oleh kerana pemberitahuan Borang A luput selepas 12 bulan jika tiada penyiaran Borang D dalam tempoh tersebut, maka penyiaran pemberitahuan Borang A, dalam keadaan sedemikian, akan menjadi sia-sia. Perkataan "dalam kes-kes lain" yang terdapat pada Jadual Pertama Akta harus merangkumi sama situasi di mana Borang A telah luput atau

di mana ianya tidak disiarkan. Dalam keadaan sedemikian, harga pasaran adalah seperti pada tarikh deklarasi Borang D disiarkan di dalam gazet. Ianya mengikut bahawa Akta, secara implikasi, tidak berniat bahawa pemberitahuan Borang A adalah mandatori.

[2b] Selagi dan sehingga pihak berkuasa negeri berpuas hati bahawa mana-mana tanah dalam mana-mana kawasan di dalam negeri berkemungkinan akan diperlukan, tidak timbul sebarang kewajipan untuk menyiarkan pemberitahuan Borang A di bawah s. 4(1) Akta. Selain itu, apabila pihak berkuasa negeri memutuskan bahawa tanah-tanah berkaitan adalah diperlukan, deklarasi Borang D mengenainya akan menyusul. Oleh itu, penyiaran pemberitahuan Borang A adalah tidak mandatori. Maka itu, kegagalan untuk menyiarkan pemberitahuan Borang A dalam kes semasa tidak menjadikan prosiding pengambilan tak sah dan batal.

[3] Terdapat kegagalan untuk menyerahkan Borang E kepada perayu sebagaimana yang dituntut oleh s. 11(1) Akta. Ia berpunca dari kegagalan memberitahu bahawa alamat penyerahan adalah di Kuala Lumpur dan bukannya di Kelang. Terdapat juga kegagalan untuk memahami seksyen kecil 2 kepada s. 53 Akta. Selain itu, serahan yang dikatakan dilaksanakan oleh penghantar notis boleh dipersoalkan. Walaupun begitu, tidak terdapat niat jahat. Tidak wujud niat untuk menjalankan penyiasatan tanpa memberi peluang kepada perayu untuk didengar. Penangguhan yang diberi bagi membolehkan perayu menyediakan laporan penilaian membuktikan hal ini. Selain itu, perayu tidak diprejudis dan tidak berlaku sebarang ketidakadilan kepada mereka oleh kerana mereka mengetahui tarikh penyiasatan dan ia diadakan dengan kehadiran mereka. Dalam keadaan ini, tanpa perlu merujuk kepada s. 56 Akta, kegagalan menyerahkan Borang E tidak harus membatalkan penyiasatan.

Oleh Azmel Maamor H (majoriti)

[1] Tidak terdapat prejudis sebenar yang dilakukan terhadap perayu. Mereka tidak dihalang dari menghadiri pendengaran di hadapan Penolong Pentadbir Tanah. Mereka menghadirkan diri dan/atau diwakili oleh peguam. Malah, mereka telah diberi peluang untuk mengemukakan laporan penilaian mereka walaupun mereka memilih untuk tidak mengemukakannya. Perayu tidak dihalang dari mendapatkan pampasan dan tidak ada bukti yang menunjukkan bahawa pampasan yang dibayar kepada mereka lebih rendah berbanding yang dibayar kepada pemilik-pemilik berdekatan. Kehadiran perayu di pendengaran telah menghapuskan apa jua ketidakteraturan yang wujud sebelumnya.

Case(s) referred to:

Bennett v. Commissioner of Police of the Metropolis [1995] 1 WLR 488 ***(refd)***
Bourgoin SA v. Minister of Agriculture, Fisheries and Food [1986] QB 716 ***(refd)***
Brennan v. Comcare [1994] 122 ALR 615 ***(refd)***
Byrne v. Ireland [1972] IR 241 ***(refd)***
Carter v. Bradbeer [1975] 3 All ER 158 ***(refd)***
Collector of Allahabad v. Raja Ram Jaiswal AIR [1985] SC 1622 ***(refd)***
Cullen v. Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] 1 WLR 1763 ***(refd)***
DK Basu v. State of West Bengal AIR [1997] SC 617 ***(refd)***
Dunlop v. Woollahra Municipal Council [1982] AC 158 ***(refd)***
Fose v. Minister of Safety and Security [1996] 2 BCLR 232 ***(refd)***
Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***
Hong Lee Trading & Construction Sdn Bhd v. Taut Hing Realty Sdn Bhd [1991] 1 MLJ 250 ***(refd)***
Jaundoo v. Attorney-General of Guyana [1971] AC 972 ***(refd)***
Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Service [1978] AC 655 ***(refd)***
Guan Seng Co Ltd v. Pentadbir Tanah Daerah Larut etc [1994] 1 MLJ 4 ***(refd)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1997] 2 MLJ 152 ***(refd)***
Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 FC ***(refd)***
Lai Tai v. The Collector of Land Revenue [1960] 2 MLJ 83 ***(refd)***
Lim Eng Kay v. Jaafar Mohd Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Maharaj v. Attorney-General of Trinidad & Tobago (No 2) [1979] AC 385 ***(refd)***
Nilabati Bahera v. State of Orissa [1993] AIR SC 1960 ***(refd)***
Oag v. R [1985] 22 CRR 171 ***(refd)***
Othman v. Mek [1972] 2 MLJ 158 ***(refd)***
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 2 MLJ 35 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***
R v. Germain [1984] 10 CRR 232 ***(refd)***
Re Application of Tan Oon & Ors [1985] 1 MLJ 67 ***(refd)***
S Kulasingham v. Commissioner of Lands, Federal Territory [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***
Santa Fe Railway Co v. Ellis [1897] 165 US 150 ***(refd)***
Simpson v. Attorney General [1994] 3 NZLR 667 ***(refd)***
Socit United Docks v. Government of Mauritius [1985] AC 585 ***(refd)***
State (At the Prosecution of Quinn) v. Ryan [1965] IR 70 ***(refd)***
Superintendent of Lands And Surveys, Sarawak v. Aik Hoe & Co Ltd [1966] 1 MLJ 243 ***(refd)***
Syed Omar Abdul Rahman Taha Alsagoff v. Government of the State of Johore [1975] 1 MLJ 241 ***(refd)***

United Malayan Banking Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***
Wong Kee Sing Realty Sdn Bhd v. The Collector of Land Revenue, Gombak [1995] 1 LNS 363 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(4)
Federal Constitution, arts. 4(1), 5(1), 8(1), 13(1), 160(2)
Government Proceedings Act 1956, s. 33(4)
Land Acquisition Act 1960, ss. 4(1), (4), 7, 8(1), 10, 11(2), 53(1), 56
National Land Code, s. 431(1)(b)(c)
Rules of the High Court 1980, O. 53

Civil Procedure Code 1908 [India], O. 41 r. 33
Constitution of Trinidad & Tobago, s. 1(a)
Employment Protection Act 1975 [UK], s. 14(1)
Land Acquisition Act 1894 [India], s. 4(1)

For the appellants - K Ananthan (K Kirubakaran); M/s Kiru & Yong
For the respondent - Engku Nor Faizah Engku Atek; State Legal Advisor

[Appeal from High Court, Seremban; Originating Summons: No 24-235-95]

[The appellants have applied for leave to appeal to the Federal Court vide Civil Application No: 08-60-2004 (N)]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

The Background

The new township of Bandar Baru Nilai stands on lands acquired by the State Government of Negeri Sembilan in the exercise of their powers under the Land Acquisition Act 1960 ("the Act"). The present litigation arises out of that acquisition.

The appellants were registered co-proprietors of a piece of land in the Mukim of Labu. It was one of the several pieces of land acquired for the new township. The complaint is that the acquisition is in violation of law.

The appellants' case in support of that complaint is simple enough. It is based on facts that are common ground between the parties. The appellants say that the Forms A and B prescribed by the Act were never issued and that Forms D, E and F though issued were not served. The certificate of urgency to take possession in Form I was issued on 18 September 1993. Two days later, on 20 September 1993, the notification of acquisition in Form K was issued. It

was only after Forms I and K were served on the appellants that they became aware of the acquisition. However, by the time Forms I and K were issued and served, the Land Administrator's inquiry into the issue of compensation had already commenced. The award of compensation for the acquisition was made on 14 July 1994. The appellants were awarded RM2 per square foot as compensation. However, about two years later, the appellants land was sold to a private limited company at a price of RM53 per square foot, that is to say, almost thirty times the value assessed and awarded by the Land Administrator.

The appellants being dissatisfied with the value assessed and awarded initiated land reference proceedings. They also took out an originating summons claiming the following relief: (i) an order setting aside the acquisition; (ii) an order retransferring their land to them; (iii) damages; and (iv) further or other appropriate relief.

The land reference came for hearing before the High Court on 12 February 1996. Counsel for the appellants moved the court for an adjournment pending the disposal of the summons which by then had been fixed for hearing on 4 March 1996. The learned judge did not deal with the appellants' application for adjournment. Instead, in the face of strong objection, he directed that the summons be brought forward before him on the following day, that is, 13 February 1996 for hearing and disposal. The summons was heard on 13 February and dismissed. As for the land reference, this was adjourned on several occasions and was dismissed on 12 February 2001. The present appeal is directed against the order of the learned judge dismissing the appellants' summons.

The Issues

On these facts, two main issues arise for decision. These are, first, whether the acquisition of the appellants' lands was in accordance with law, that is to say, in this particular instance, whether it was in accordance with the provisions of the Act.

Second, if the acquisition was not in accordance with law, then the relief, if any, that ought to be granted to the appellants.

The First Issue: The Legality Of The Acquisition

The main plank of the submission of learned counsel for the appellants on the first issue rests on two alleged violations of the Act. The first violation, it was submitted, relates to the non-issuance of Forms A and B prescribed by the Act. The second violation relates to the non-service of Forms D, E and F. Since the acquiring authority's response to these two parts of the case differs, I shall deal with them separately.

Now, it is common ground that Forms A and B were never issued. Learned counsel for the appellants submits that this is fatal to the acquisition process. In order to appreciate this argument regard must be had to s. 4 which is the relevant provisions of the Act. It reads as follows:

> (1) Whenever the State Authority is satisfied that any land in any locality in the State is likely to be needed for any of the purposes referred to in section 3 a notification in Form A shall be published in the Gazette.
>
> (2) The Land Administrator shall give public notice of any notification published under subsection (1) in the manner prescribed by section 52.
>
> (3) A notification under subsection (1) shall lapse in so far as it relates to any land or part of any land in respect of which there is not published in the Gazette within twelve months from the date of publication of such notification a declaration under section 8(1).
>
> (4) Notwithstanding subsection (3), it shall be lawful for the State Authority to publish a fresh notification under section 4 (1) in respect of the land or part of the land in relation to which the notification had lapsed if the State Authority is satisfied that such land or such part of the land is likely to be needed for any of the purposes referred to in section 3.

It is common ground that sub-s. (4) is not relevant to the facts of this case.

It is to be noticed at once that the section uses the word "shall" in each of its subsections. Learned counsel for the appellants submitted that this points to the section being imperative or mandatory. He cited no authority in support, presumably because he considered the point beyond argument. However, the learned state legal adviser argued that compliance with s. 4(1), or indeed any of the other subsections of that section is not mandatory. She submitted that the word "shall" in s. 4(1) was merely directory and not mandatory. In support of her argument, she cited *Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Service* [1978] AC 655. But I really do not think that that case is of any assistance. That was a case involving s. 14(1) of the United Kingdom Employment Protection Act 1975. The issue was whether the word "shall" appearing in that section was mandatory or directory. It was in the particular context of that case that Lord Salmon said in his speech (at p. 698):

> The result of this appeal turns solely on whether that part of s. 14(1) which I have cited is mandatory or directory. *Prima facie* the word 'shall' suggests that it is mandatory but that word has often been rightly construed as being directory. **Everything turns on the context in which it is used: the subject-matter, the purpose and effect of the section in which it appears.** (emphasis added.)

The caveat inserted by Lord Salmon in the concluding sentence of his speech is, I think, is an expression of the true guide to construction.

At this stage something needs to be said about the value of precedent in cases that concern statutory interpretation. It is trite that when a court interprets words in a particular statute, decisions of other courts on similar words appearing in a different statute have little or no weight in determining what meaning we ought to ascribe to those words. The point was made by Lord Diplock in *Carter v. Bradbeer* [1975] 3 All ER 158, 161:

> A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The *ratio decidendi* of a judgment as to the meaning of particular words or combinations of words used in a particular statutory provision can have no more than a persuasive influence on a court which is called on to interpret the same word or combination of words appearing in some other statutory provision. It is not determinative of the meaning of that other provision. This is because the inherent flexibility of the English language may make it necessary for the interpreter to have recourse to a variety of aids or canons of construction, which are not merely lexicographical, in order to select from what may be a number of different meanings which the words as a matter of language are capable of bearing, the precise meaning in which the legislature intended them to be understood. Canons of construction may prove to be conflicting guide posts: they may point different ways. Fashions in parliamentary draftsmanship and the attitude of the legislature toward innovations in established law are not unchanging. Such changes as have taken place are properly reflected in the relative importance to be attached to the guidance given by competing canons of construction which point in different ways. If one looks back to the actual decisions of this House on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.

In *Brennan v. Comcare* [1994] 122 ALR 615, 634, Gummow J distinguished between a case that establishes a principle and thereby a precedent and a decision on the meaning and effect of particular words appearing in a particular statute. He said:

> The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts

to which expression was sought to be given. The distinction is usefully expressed in the following passage from Judge Posner's work *The Problems of Jurisprudence*, 1990, p. 248:

> Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.
>
> Statutory law differs in that the statutory text – the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision-making – is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute – that is, interpret the statute. (There is a sense in which common law judges 'interpret' common law, but it is the sense in which 'interpretation' means 'understanding'.)

Bearing in mind what has been said in the cases referred to above, I turn now to consider whether the word "shall" in s. 4(1) of the Act is mandatory or merely directory. In doing so, I take into account the fact that regard must be had to s. 4(1) not in isolation but in the context of the Act when read as a whole. And it is this approach that I adopt.

It may be accepted as settled beyond argument that the object or purpose of the Act in essence is to empower the State to deprive an owner of his immovable property in exchange for fair and reasonable compensation. There is no right vested in an owner to a pre-acquisition hearing: see, *S. Kulasingam v. Commissioner of Lands, Federal Territory* [1982] CLJ 65; [1982] CLJ (Rep) 314. However, there is a right to be heard at an inquiry held by the Land Administrator with regard to the quantum of the compensation that is to be awarded. Since it is a statute that is aimed at deprivation of property, courts require the acquiring authority to act strictly in accordance with the terms of the Act. See, *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 2 MLJ 35.

Thus, when s. 4(1) is read in the context of the Act as a whole, it is clear that the word "shall" that appears in that subsection is mandatory and not merely directory in effect. Put in another fashion, the word "shall" *prima facie* denotes a mandatory provision and there is nothing in the context of the Act that points to a contrary meaning.

No Malaysian case was cited to us either in support or in opposition to the view I take. However, there is a decision of the Indian Supreme Court on s. 4(1) of the Indian Land Acquisition Act 1894. That provision reads as follows:

> 4(1) Whenever it appears to the appropriate Government or Collector that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said, locality.

As may be seen the Indian provision is similar to our s. 4(1). And it may be added for good measure that our courts have repeatedly relied on Indian cases when deciding land acquisition disputes. See, *Superintendent of Lands And Surveys, Sarawak v. Aik Hoe & Co Ltd* [1966] 1 MLJ 243. For a more recent illustration, assistance may be had from the well-reasoned judgment of Abdul Malik Ishak J in *Guan Seng Co Ltd v. Pentadbir Tanah Daerah Larut etc* [1994] 1 MLJ 4.

In *Collector of Allahabad v. Raja Ram Jaiswal* AIR [1985] SC 1622, Desai J said of the Indian s. 4(1):

> A bare perusal of s. 4(1) clearly shows that in order to comply with the statutory requirements therein set out, a notification stating therein 'the land which is needed or is likely to be needed for a public purpose' has to be published in the official Gazette. The second part of the sub-section provides that the Collector has to cause public notice of the substance of such notification to be given at convenient places in the locality in which the land proposed to be acquired is situated. Both the conditions are held by a catena of decisions to be mandatory. Whether the second condition is mandatory or directory is no more res integra. In *Khub Chand v. State of Rajasthan* [1967] 1 SCR 120 at p. 125: (AIR [1967] SC 1074 at p. 1077), Subba Rao CJ speaking for the Court observed that
>
> > the statutory intention is, therefore, clear, namely, that the giving of public notice is mandatory. If so; the notification issued under s. 4 without complying with the said mandatory direction would be void and the land acquisition proceedings taken pursuant thereto would be equally void.

As earlier observed, Form A was admittedly not issued. This omission amounts to a clear violation of the mandatory provisions of s. 4(1) of the Act.

That brings me to the second alleged violation of the Act, namely, the non-service of Forms D, E and F. Before us, the learned state legal adviser conceded that issuance and service of these forms is a mandatory requirement under ss. 8, 10 and 11 of the Act. I think that the concession was rightly made.

There is a surfeit of authority that supports the proposition that has been conceded. See, *Syed Omar bin Abdul Rahman Taha Alsagoff v. Government of the State of Johore* [1975] 1 MLJ 241; *Hong Lee Trading & Construction Sdn Bhd v. Taut Hing Realty Sdn Bhd* [1991] 1 MLJ 250.

Form D which is issued pursuant to s. 8 of the Act is a critical document because it is the declaration that the land in question is needed by the State. It seals the fate of the land. By virtue of s. 10(1), Form E commences the acquisition process. When served, Form D must accompany Form E (s. 10(3)). Based on the authorities decided on s. 8, only some of which I have referred to in para. 21of this judgment, the non-observance of the provisions of s. 8 is a serious matter. The learned legal adviser readily concedes the point. But she provides a two pronged response.

Her first answer is that there was in fact service of Forms D, E and F on the appellants. However, the enthusiasm with which she initially pursued her argument waned as she took us through the evidence. All I need say is that there is abundant evidence on record affirmatively proving quite conclusively that there was no service of Forms D and E as mandated by the Act. So far as Form F is concerned, it was to have accompanied Forms D and E. Hence no separate comment in respect of it is called for.

Her second response was that this was a case to which s. 56 of the Act applies. That section provides as follows:

> No omission or failure to make due publication of a notice or to make due service upon persons and parties interested as provided in this Part shall invalidate any proceedings under this Act.

According to the learned legal adviser, s. 56 is applicable to the present instance because the instant respondent served Forms D, E and F by posting them on the appellants' land pursuant to s. 53(2) of the Act. That section reads:

> (2) If the person to whom any copy referred to in subsection (1) is delivered or tendered is unwilling or unable to sign the acknowledgement thereof, or if no proper person can be found on whom to effect service, service may be effected by fixing a copy thereof:
>
> (a) upon the outer door of the building in which the person therein named ordinarily dwells or carries on business; and
>
> (b) on any public notice-board in the town, village or mukim in which the person to be served usually resides.

With respect I find no merit in this argument. The facts here simply do not come within s. 53(2) at all. This is not a case in which there was a person (or were persons) to whom a document was – to use the opening words of s. 53(2) – "delivered or tendered" but was "unwilling or unable to sign the acknowledgement thereof". Neither is this a case where "no proper person can be found on whom to effect service". In the present case there was simply no service whatsoever. The appellants lived at an address along Jalan Kelang Lama. The forms in question were sent by the instant respondent to the Land Administrator at Kelang who returned them unserved. That is not a matter of surprise at all because Jalan Kelang Lama is not in Kelang: it is in Kuala Lumpur. So, the pre-conditions set by s. 53(2) are absent in this case.

If I were to accept the argument of the learned legal adviser it would amount to this. In every case, an acquiring authority may, without serving any of the Forms prescribed by the Act on the registered proprietor, deprive the latter of his or her land. Even if the land were acquired without giving the owner notice (in Form E) of the compensation inquiry s. 56 would validate the acquisition. The proposition needs only to be stated to reveal its absurdity.

A similar argument as that advanced before us was taken in *Wong Kee Sing Realty Sdn Bhd v. The Collector of Land Revenue, Gombak* [1995] 1 LNS 363. Mahadev Shankar J found no difficulty in repelling it. He said:

> In my view a 'failure to make due service' (appearing in section 56) cannot be equated to a total failure to make any service at all. This is not a situation of nought equals nought, but rather a situation of making service, in a manner not provided for by section 53, an irregularity rather than a nullity.
>
> 59. The proviso to section 11 reflects a principle which is fundamental to our legal system which is that no person shall be condemned unheard. As D.Y.M.M. Tuanku Raja Azlan Shah (as he now is) said in *Ketua Pengarah v. Ho Kwan Seng* [1977] 2 MLJ at 154:
>
> > The Courts clung to this principle as the powers of government expanded, and applied it frequently in many fields such as ... **compulsory purchase of land**. (emphasis added)
>
> 60. Similar statements were expressed by Adams J in *Lai Tai v. The Collector of Land* [1960] 26 MLJ 83 where he said:
>
> > It is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so, so that he may be heard. The Enactment makes it quite clear that every reasonable effort should be taken to ensure that the owner and occupier are served with notice of the proceedings.

61. And by YA VC George in the *Application of Tan Oon and Others* [1985] 2 MLJ 67 at p. 71:

> The Courts not only have power but will readily use such power to quash administrative decisions which were arrived at without due observance of the requirements of the statute under which the decision was purported to have been arrived at or which was arrived at without due observance of the principles of natural justice if it can be shown that the effect of the decision is in some real sense against good conscience.

62. Consequently I must hold that in so far as these lots were concerned, the total failure to effect service invalidated the acquisition.

I would respectfully adopt his lordship's views. Section 56 is directed at a situation where there was service but not "due service", that is to say, service in exact terms as prescribed by s. 53. It is has no application to a case as the present, where there was no service at all.

Applying the principle in *Wong Kee Sing Realty Sdn Bhd v. The Collector of Land Revenue, Gombak* to the facts of the instant case, it is my considered judgment that the acquisition here was wholly invalid. The question then arises: what is the effect of invalidity? And that brings me to the second principal issue in this case.

The Second Issue: The Appropriate Remedy

As stated earlier, the primary relief sought by the appellants in their summons is for an order setting aside the acquisition. Learned counsel for the appellants submitted that his clients are entitled to this relief by reason of the acquisition not being in accordance with law. With respect, I consider that argument to be unsound.

In substance, what the appellants seek is to quash the acquisition proceedings as being null and void. Such an order is only available in *certiorari* proceedings either under RHC O. 53 as it formerly stood or on an application for judicial review under O. 53 as it is presently cast. Alternatively, it was open to the appellants to seek a declaration that the acquisition is null and void. Such a declaration would, if granted, have the effect of nullifying the acquisition. The appellants' case is amply covered by Lord Diplock's speech in *Grunwick Processing Laboratories Ltd v. Advisory Conciliation and Arbitration Service* where he said:

> where a statutory authority had acted *ultra vires* any person who would be affected by its act if it were valid is normally entitled *ex debito justiciae* to have it set aside, if he has proceeded by way of *certiorari*, or to have it declared void.

Since the summons here does not seek a declaration, the second limb of Lord Diplock's dictum does come to the appellants' rescue. I would add for good measure that even if these were *certiorari* proceedings, a quashing order should not, in the court's discretion have issued by reason of the facts here. This is a case where the land has been transferred to third parties who have *bona fide* acquired titles to the separate lots. It is common knowledge that Nilai New Town (Bandar Baru Nilai) has already been built and that third parties have in good faith purchased individual lots in it. It would therefore be practically unjust for a court to set aside the acquisition.

For the reasons already stated, the prayer to have the acquisition set aside fails. The second prayer is merely consequent on the first. Since there can be no setting aside, it follows that there can be no restoration of the *status quo* ante. Accordingly the second prayer also fails.

Now the claim for damages. It is trite law that an award of damages may only be made where authorised either by statute or the common law. Here, neither the Act nor other written law empowers the court to award damages in a case where there is an acquisition in violation of its provisions. So no question of statutory authorisation arises.

As for the common law, if the appellants are to recover damages in a case as the present, their remedy lies in what Lord Diplock in *Dunlop v. Woollahra Municipal Council* [1982] AC 158 described as "the well-established tort of misfeasance by a public officer in the discharge of his public duties."

The 5th edn of *de Smith, Woolf and Jowell's Judicial Review of Administrative Action* sets out the ingredients of the tort as follows:

> A public authority or person holding a public office may be liable for the tort of misfeasance in public office where:
>
> (1) there is an exercise or non-exercise of public power, whether common law, statutory or from some other source;
>
> (2) which is either (a) affected by malice towards the plaintiff or (b) the decision maker knows is unlawful; and
>
> (3) the plaintiff is in consequence deprived of a benefit or suffers other loss.

It is to be noted that the requirement of malice in ingredient (2)(b) refers to an intent to injure the plaintiff and not to any ill-will towards him or her. See, *Bennett v. Commissioner of Police of the Metropolis* [1995] 1 WLR 488, 501. As for the requirement of knowledge, all that needs to be proved is that the particular defendant knew or had means of knowledge that his act or omission was contrary to law: *Bourgoin SA v. Minister of Agriculture, Fisheries and Food* [1986] QB 716.

The present case is not one framed as a cause of action in the tort of misfeasance in public office. None of the ingredients of the tort have been either alleged or proved. The issue of a remedy in damages in tort simply does not arise.

For the reasons given, the claim for damages also fails.

The position then is this. The appellants have made out a clear case of deprivation of their land in violation of the provisions of written law. But, because of the way in which their pleading has been settled, they are not entitled to the principal reliefs they claim. Does it then follow that they are to leave the precincts of this court bereft of any remedy for the wrong they have suffered? If that be so then there is something terribly wrong with our justice system.

But I do not apprehend that to be the case. The law is not so impotent that it will let an injustice pass by while having its limbs bound by procedural technicalities. As Ong Hock Sim FJ said in *Othman v. Mek* [1972] 2 MLJ 158, 165:

> … it is the duty of the courts to exercise the utmost diligence in applying the maxim *ubi jus ibi remedium*, so that justice shall be done, unless we are strictly constrained by law to uphold any decision which results in injustice.

The attitude of our courts to legal technicalities is summed up in the following passage in the judgment of Ahmad Fairuz JCA (now Chief Justice) in *United Malayan Banking Berhad v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 where his lordship collected the authorities on the subject:

> Our Federal Court in the case of *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p. 189 said:
>
> > The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.
> >
> > In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
> >
> > But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
> >
> > This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear* [1907] 1 KB 1:

> Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; *and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.* (emphasis added.)

And in the same case, Ali FJ, said (at p 192):

> The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.

In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 342, ie:

> … After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case … (emphasis added.)

Kaikaus J, in *Imtiaz Ahmad v. Ghulam Ali* PLD [1963] SC 382 at p. 400 said:

> Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his. (emphasis added.)

Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality.

So, the fact that a plaintiff claims the wrong relief or does not claim the correct relief does not bar the court from granting the relief appropriate to the particular circumstances to prevent injustice by acting under the prayer for further or other relief. Thus, in *Lim Eng Kay v. Jaafar bin Mohd Said* [1982] CLJ 298; [1982] CLJ (Rep) 190, Salleh Abas FJ (as he then was) said:

> We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

Further, this court has ample jurisdiction and power under s. 69(4) of the Courts of Judicature Act 1964 to "make any order which ought to have been given or made, and make such further or other orders as the case requires". These words which were adopted, with slight inconsequential variation in

language, from O. 41 r. 33 of the Indian Civil Procedure Code 1908 empower this court to do complete justice between the parties. See, *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747; *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11 (FC).

Acting on the foregoing authorities, it is plain that this court is empowered to grant the appellants such relief as is appropriate in law to do justice in accordance with the circumstances of the case. Now, this is a case in which, I have already said, the appellants were deprived of their land in violation of the provisions of the Act. In other words the deprivation here was not in accordance with the provisions of written law and therefore contravenes art. 13(1) of the Federal Constitution. That article reads:

> 13(1) No person shall be deprived of property save in accordance with law.

Article 160(2) of the Federal Constitution defines law as follows:

> Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

In *S. Kulasingam v. Commissioner of Lands, Federal Territory* [1982] CLJ 65; [1982] CLJ (Rep) 314, Abdoolcader J said:

> The Privy Council decided in *Government of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 MLJ 133, 135; [1978] AC 337, 347 that Article 13 cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed as deprivation may take many forms which would naturally include acquisition or use but that those are not the only ways by which deprivation can be effected. We therefore have to consider the connotation of the term 'law' in Article 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, 71; [1981] AC 648 said (at page 670) that 'law' in such a context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to similar written constitutions including ours.

In *Ong Ah Chuan v. Public Prosecuto*r, Lord Diplock pointed out the serious error in treating the word "law" in the Singapore Constitution (and, as Abdoolcader J pointed out in *Kulasingham*'s case *(supra)*, the same applies to our Constitution), as meaning only written law. His Lordship there said:

Accordingly their Lordships are unable to accept the narrow view of the effect of Articles 9(1) and 12(1) for, which counsel for the Public Prosecutor contended. This was that since 'written law' is defined in Article 2(1) to mean 'this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore' and 'law' is defined as including "written law", the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be. To the full breadth of this contention one limitation only was conceded: the arbitrariness, the disregard of fundamental rules of natural justice for which the Act provides must be of general application to all citizens of Singapore so as to avoid falling foul of the anti-discriminatory provisions of Article 12(1).

Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of *petitio principii*. The definition of 'written law' includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are 'for the time being in force in Singapore'; and Article 4 provides that 'any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. So the use of the expression 'law' in Articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.

In a later passage his Lordship added:

It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules (of natural justice). If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

These cases make it clear that a court that reads the expression "law" in arts. 5(1), 8(1) and 13(1) as meaning only written law would fall into serious error for two reasons. First, it would fall foul of the definition of "law" itself in art. 160(2) which includes common law. Second, it would mean that any and all of the fundamental liberties guaranteed under Part II of the Federal Constitution could be swept away by one ordinary Act of Parliament. This would render illusory the words of art. 4(1) of the Federal Constitution which declares:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

For, it would be an Act of Parliament and not the Constitution that would be supreme. And that is certainly not the case.

It follows that any deprivation of property under art. 13(1) or for that matter life or personal liberty under art. 5(1) must be in accordance with a statute that meets the common law test of fairness of State action. In the context of the present appeal, there is no doubt that there was a deprivation of property that was not in accordance with the provisions of written law, namely, the Act.

One of the appropriate remedies for the breach of a fundamental right guaranteed by the Constitution is an award of monetary compensation. In *Maharaj v. Attorney-General of Trinidad & Tobago (No. 2)* [1979] AC 385, the appellant, a member of the Bar had been convicted of contempt of court without the particulars of the charge being put to him as required by law and sentenced to imprisonment a portion of which he served. The Privy Council quashed his conviction. The appellant then brought proceedings to recover compensation for a breach of his fundamental right not to be deprived of his liberty save in accordance with due process of the law, which right was guaranteed by s. 1(a) of the Constitution of Trinidad & Tobago. In allowing his claim, the Privy Council, speaking through Lord Diplock said:

> The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress under s. 6(1) can ever include an exemplary or punitive award.

The decision in *Maharaj v. Attorney-General of Trinidad & Tobago (No. 2)* has been followed and applied by courts across the Commonwealth in jurisdictions having written constitutions. It has been applied in Canada (*R. v. Germain* [1984] 10 CRR 232; *Oag v. R.* [1985] 22 CRR 171), in South Africa (*Fose v. Minister of Safety and Security* [1996] 2 BCLR 232; in New Zealand (*Simpson v. Attorney General* [1994] 3 NZLR 667) in India (*Nilabati Bahera v. State of Orissa* [1993] AIR SC 1960), and by the Privy Council on an appeal from Mauritius concerning the deprivation of property (*Socit United Docks v. Government of Mauritius* [1985] AC 585).

In *Jaundoo v. Attorney-General of Guyana* [1971] AC 972, the appellant owned an area of land in Guyana upon which the Government proposed to construct a new road. The appellant brought proceedings against the Government on the ground that its action contravened her fundamental rights under art. 8(1) of the Constitution of Guyana (the equivalent of our art. 13). That article provided as follows:

> No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by a written law – (a) requiring the prompt payment of adequate compensation; and (b) giving to any person claiming such compensation a right of access, either directly or by way of appeal for the determination of his interest in or right over the property and the amount of compensation, to the High Court.

The courts of Guyana having dismissed her action on procedural grounds, the appellant appealed to the Privy Council. By the time her appeal came on for hearing, the road had been completed and her claim for an injunction was rendered academic. The Privy Council allowed the appeal and remitted the case to the courts of Guyana for disposal on merits. It held that upon the appellant establishing her case on the merits she would be entitled to the award of monetary compensation for a breach of her fundamental rights. Lord Diplock who delivered the advice of the Board said:

> Their Lordships accept that if the landowner is successful on the merits in establishing her claim that her fundamental rights under article 8 of the Constitution have been contravened, any order for redress to be made by the High Court against 'the Government of Guyana' ought not to be in form, as it cannot be in substance, coercive. There is more than one way in which this could be avoided. The order could be declaratory in form and declare the right of the landowner to be paid by the Government of Guyana the amount assessed by the court as appropriate redress by way of compensation or damages. Alternatively, following the precedent of the Crown Liabilities Act 1888 of South Africa and the Crown Proceedings Act 1947 of the United Kingdom, the High Court could make an order for payment against the Government of Guyana, but accompanied by a further order that '**no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing the payment** by the Government of Guyana **of any such money or costs.**' Their Lordships have no doubt that an order in either of these forms would be complied with by the Government of Guyana. (The underlining is ours.)

I would observe that the words which I have underlined in the foregoing passage may be found in s. 33(4) of our Government Proceedings Act 1956.

In *Socit United Docks v. Government of Mauritius* the Privy Council applied the principle in Jaundoo to a case concerning the breach of a fundamental right to property under the Constitution of Mauritius. Lord Templeman said:

> In *Jaundoo v. Attorney-General of Guyana* [1971] AC 972 the Board held that redress … included redress by way of an award of compensation for damages. The same principles apply to the Constitution of Mauritius although on the present appeals the contrary was faintly argued.

Ireland has a written constitution, guaranteeing fundamental rights. Like our Federal Constitution it contains no provision of a remedy for the infringement of those rights. Yet, the Courts of Ireland have developed remedies, including the award of monetary compensation, for the infringement of fundamental rights. Thus, in *State (At the Prosecution of Quinn) v. Ryan* [1965] IR 70, O' Dalaigh CJ said:

> It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires.

Again, in *Byrne v. Ireland* [1972] IR 241, Walsh J said (at p. 264):

> In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizen and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is once guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitution obligation imposed.

In *Cullen v. Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] 1 WLR 1763 the House of Lords (by a majority) held that no damages could be recovered by a private citizen for damage caused to him by the breach of a statute by a public authority, though the position was different if what was violated was a fundamental right guaranteed by the Constitution. Lord Hutton who delivered the principal majority speech of the House said:

> In the present case the appellant does not use the term 'constitutional right' in this limited sense. He cites decisions in other jurisdictions with written constitutions as establishing that a breach of a 'constitutional right' can give rise to a claim for damages without proof of damage or harm. In the sense in which the appellant seeks to rely on it, a 'constitutional right' is a right

which a democratic assembly representing the people has enshrined in a written constitution. As the Judicial Committee of the Privy Council stated in *Mohammed v. The State* [1999] 2 AC 111, 123F-H:

> It will be recalled that in *King v. The Queen* [1969] 1 AC 304, at p 319, Lord Hodson observed that it matters not whether the right infringed is enshrined in a constitution or is simply a common law right (or presumably an ordinary statutory right). Their Lordships are satisfied that in *King v. The Queen*, which was decided in 1968, the Board took too narrow a view on this point. It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right.

See also *Darmalingum v. The State* [2000] 1 WLR 2303, 2308 A-B.

Therefore where a right is contained in a written constitution it is accorded a special value by the courts and a breach of that right without damage or harm can lead to an award of damages. In this case which relates to a provision in an ordinary statute I consider that the decision of the House in Pickering (*Pickering v. Liverpool Daily Post* [1991] 2 AC 370) affords clearer guidance than decisions in other jurisdictions relating to rights set out in written constitutions. (emphasis added.)

In the same case, Lord Millett said this:

> If Mr Cullen had been deprived of access to a lawyer in a country with a written constitution on the Westminster model, his remedy would not lie in a private law action for damages, but in a motion for constitutional redress. In *Maharaj v. A-G of Trinidad and Tobago (No 2)* [1979] AC 385 Lord Diplock explained that this was the means by which **the subject could seek redress from the Crown for a contravention of his constitutional rights by an arm of the state**. In an appropriate case redress could be made by an award of damages, but the state's liability, he said at p 399: 'is not a liability in tort at all; it is a liability in the public law of the state.' (emphasis added.)

Three principles may be extracted from the majority speeches in *Cullen*. First, a fundamental right guaranteed by the Constitution is a value added right. Second, because it is a value added right, its breach is to be redressed by an award of compensation without proof of actual damage, ie, on the footing of strict liability. Third, the State is liable to compensate a citizen for a violation of his or her constitutional right by any arm of the State.

Closer to home, in *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147, the Federal Court commented favourably upon the decision of the Indian Supreme Court case of *Nilabati Bahera v. State of Orissa. Edgar* Joseph Jr. FCJ said as follows:

> To interpolate, I should like to make a separate reference to a recent landmark judgment of the Indian Supreme Court in *Nilabati Behera* [1993] 2 SCC 504, which shows that the reach and extent of the court in Judicial Review proceedings, arising from a violation of a fundamental right, extends to the making of an award of monetary compensation, against the State, even though the India Constitution does not provide for the payment of damages or monetary compensation in such a situation, thus over-riding the principle of sovereign immunity. In so holding, the court had laid stress on the point (at pp. 762-763) that this remedy was 'distinct from and in addition to, the remedy in private law for damages for the tort resulting from contravention of the fundamental right' for which a regular writ action could be commenced, in which event, as Mr Soli J Sorabjee has observed, in his article aforesaid, the matter may hopefully be decided after a couple of decades. What appeared to be in the forefront of the court's mind was to ensure prompt redress by an Award of monetary compensation to the aggrieved party or his family. In the picturesque phrase of the court, to hold to the contrary would 'render the court powerless and the constitutional guarantee a mirage'.
>
> I should perhaps add that the importance of a litigant who has succeeded in his action for wrongful dismissal not being usually sent away empty handed was stressed by Lord Brightman in Chief Constable of *North Wales Police v. Evans* [1982] 1 WLR 1155 at p 1172 in these terms:
>
> > … it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important matter as the pursuit of his own profession, has to be sent away from a court of justice empty-handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.
>
> Having regard to the breadth of the provisions of para 1 of the Schedule to the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions.

That liability for the breach of any of the fundamental rights guaranteed under Part II of the Federal Constitution is strict and not fault based was established even before the decision in Cullen by Anand J (later CJ India) in *DK Basu v. State of West Bengal* AIR [1997] SC 617 where his lordship said:

> It is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. **The claim of the citizen is based on the principle of strict liability** to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. **In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element.** (emphasis added.)

Based on these authorities, it is my considered judgment that the appellants are entitled to recover from the respondent reasonable compensation for the violation of their fundamental right guaranteed by art. 13(1) of the Federal Constitution.

For the reasons already given, I would allow the appeal and set aside the order of the High Court dismissing the appellants' summons and enter judgment for the appellants in the following terms:

(i) the respondent pay to the appellants reasonable compensation, to be assessed, for breach of the appellants' rights under art. 13(1) of the Federal Constitution;

(ii) this matter is hereby remitted to the senior assistant registrar of the High Court at Seremban with a direction to forthwith inquire into and assess the amount of compensation to be paid by the respondent to the appellants;

(iii) that the costs of this appeal and the costs of the proceedings in the High Court, including the costs of the assessment, shall be paid by the respondent to the appellants;

(iv) that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing the payment by the respondent of any such money or costs.

Guidelines For Assessment

To obviate any difficulty that may be encountered at the assessment before the registrar, I would issue the following guidelines.

When assessing the compensation hereby awarded, the registrar shall have regard to the following matters. First, the registrar, when assessing compensation, shall not have regard to or take into account the sum awarded to the appellants in the acquisition proceedings. This is because the compensation awarded is for a distinct wrong in public law suffered by the appellants. See, Lord Diplock in *Maharaj No. 2* quoted under para. 52 of this judgment. Second, the quantum

of compensation must reflect the loss suffered by the appellants in consequence of the breach of art. 13(1). The loss must be assessed as at the date when that breach occurred. Accordingly, the registrar shall ascertain the date on which the appellants' constitutional right was breached. Third, the inquiring registrar must ensure that what the appellants receive is only reasonable monetary compensation with no punitive element. Fourth, the compensation assessed shall carry interest at the rate of 4% per annum simple interest from the date of breach until the date of settlement. Fifth, the parties shall be at liberty to adduce evidence on all issues relevant to the assessment of compensation.

The deposit shall be refunded to the appellants.

Postscript

I have, since writing this judgment, had sight of my learned brother Abdul Aziz Mohamad JCA's draft judgment in which he proposes to dismiss this appeal. With great respect to my learned brother, it is entirely my misfortune that I find myself unable to agree with him as to the result of this appeal. My reasons now follow.

The draft judgment of my learned brother accepts in entirety the appellants' contention that Form A was never issued and that Form E was never served. However, my learned brother has gone on to hold that issuance of Form A is not mandatory despite the imperative language of s. 4(1). With respect, this approach disregards well settled principles of statutory construction. We are here dealing with a statute which is aimed at the prevention of arbitrary escheatment of proprietary rights, the protection of which the supreme law of the Federation **guarantees** as a fundamental right. To read mandatory provisions in such a statute in a generous and favourable manner towards those whose duty it is to ensure their due observance is to condone and promote maladministration in a matter so important as the deprivation of property. It is a message from the judicial arm of Government to the bureaucrats that due compliance with mandatory provisions of the Act will produce no consequences for them. I am therefore unable in the face of compelling authority as I have found and cited in this judgment to accept an ipse dixit based on no authority that compliance with s. 4(1) is not mandatory.

In para. 21 of his draft judgment, my learned brother accepts that Form E was not served on the appellants – and I quote – "in accordance with s. 11(1)". Accordingly, there was a breach of the written law that guards against the arbitrary compulsory acquisition of a person's immovable property. Here, my learned brother and I are on common ground. However, in the same paragraph, the draft judgment goes on to absolve this non-compliance on the ground that there was no bad faith on the part of the acquiring authority. It is with this rider that I must take issue. In the first place, the Act does not say that an

acquisition may only be attacked for breach of its terms upon proof of bad faith. Second, and more importantly, we are here dealing with a statutory provision that is mandatory in terms which is designed to be consonant with a constitutionally guaranteed fundamental right. A breach of the Act results in a state of affairs that is – to use the words of art. 13(1) – "otherwise than in accordance with law." It violates the right guaranteed by that article. Now, if at every turn, the victim of a constitutional violation is required to prove that the contravening public authority acted in bad faith then, the right calling for protection would be illusory, or, to borrow the more picturesque words of Brewer J in *Gulf Colorado and Santa Fe Railway Co. v. Ellis* [1897] 165 US 150, it would "be a mere rope of sand".

The next point on which I regretfully dissent from my learned brother is on his refusal to accept the correctness of the decision in *Wong Kee Sing Realty Sdn Bhd v. The Collector of Land Revenue, Gombak*. I have already expressed my agreement with the judgment of Mahadev Shankar J in that case. It is really an elementary point of statutory interpretation. At the risk of repetition, it is trite that s. 56 of the Act applies only to save a case where there has been due service and not a case where there has been no service.

I now deal with my learned brother's conclusion that the appellants suffered no prejudice in consequence of the admitted breach of s. 11(1) of the Act. With respect I am unable to agree with this conclusion as it suffers from two errors. In the first place, we are concerned with a statute that empowers the State to acquire the property of another only strictly in accordance with its terms. It follows that the courts must therefore insist on the strict compliance of the terms of the statute to ensure that property is not deprived save in accordance with law. There is no added burden on a property owner to show that he has suffered prejudice in addition to establishing the breach of a mandatory provision of the Act. Secondly, if in any event one wants to look for prejudice, one can quite easily find it writ large across this case. This is a case where a challenge was taken to the acquisition of property on the ground, inter alia, that s. 11(1) the Act had been breached. And there is no dispute that it was. There it is then. There is the prejudice. As far as the hearing before the High Court is concerned, short shrift was made of the appellants' complaint. The appellants' originating summons that had not even been listed for hearing was called up on short notice. There was insufficient time given to the appellants to prepare their case. It is difficult to envisage a case of graver prejudice. Unfortunately, this point has not been addressed by my learned brother's judgment.

There is a final matter that requires mention. In para. 2 of his draft judgment, my learned brother makes a point that no complaint about Form D had been made by the appellants. With respect, my learned brother's observation overlooks the fact that in the course of his arguments learned counsel for the appellants did argue the point. More importantly, the learned legal adviser conceded before us that the appellants' complaint was the non-service of Forms D, E and F. However, she argued that no prejudice had been occasioned in consequence by reason of s. 56 of the Act. It is therefore my regret that I am unable to agree with my learned brother's view as it overlooks the proceedings that had transpired before us.

With respect, I am left unpersuaded by my learned brother's draft judgment.

All that is required to be added is that my learned brother Azmel Haji Maamor J having read the draft of this judgment and that of my learned brother Abdul Aziz Mohamad JCA has expressed his agreement with the latter judgment.

Abdul Aziz Mohamad JCA:

This is an appeal against the dismissal by the High Court of the appellants' originating summons by which they sought a declaration that the proceedings for the acquisition under the Land Acquisition Act 1960 of a land of which they were co-proprietors were null and void, the return of the land to them, and damages. In submission in this appeal, which does not involve the interveners, the appellants' counsel accepted that in any case the appellants could not get back the land because it had passed on to others who acquired their titles in good faith.

In this appeal the grounds relied on by the appellants for contending that the acquisition proceedings were null and void are that certain provisions of the Act involving certain forms were not complied with. The forms are Forms A, B, E and F. My learned brother Dato' Gopal Sri Ram, whose judgment I have been privileged to read in advance, mentions also Form D, which is the declaration that s. 8(1) requires to be published in the Gazette when it is decided that any land is needed for any purpose for which land may be acquired. But there has been no complaint about Form D, be it in the appellants' affidavit in support of their originating summons, in the memorandum of appeal or in the appellants' submission in this appeal. On the contrary, in para. 8 of their written outline of arguments the appellants accept that the Form D declaration was gazetted on 18 March 1993.

No issue should have been taken at all about Forms B and F. It is a fact that no Form B was issued, and Form F was not served on the appellants. But it is not mandatory that Form B be issued or that Form F be served. Form B is a written authority under s. 5(1) by which the State Director of Lands and

Mines "may ... authorize" certain persons to enter upon certain lands and do certain work. There may not be any necessity to do such work, in which case no entry upon the land is necessary and no written authority need be issued. Form F is a form under s. 11(2) by which the Land Administrator requires the registered proprietor of any land to be acquired, or any other knowledgeable person, to furnish in writing certain information. But the Land Administrator need not require any of those persons to furnish any information because he does not need it or he has already got it. The words of the section are "may … require".

As to Form A, it comes under s. 4, sub-s. (1) of which provides as follows:

> (1) Whenever the State Authority is satisfied that any land in any locality in the State is likely to be needed for any of the purposes referred to in section 3 a notification in Form A shall be published in the Gazette.

Subsection (2) requires the Land Administrator to also give, in the manner prescribed by s. 52, public notice of the notification that is published in the Gazette. In this case there was no publication in the Gazette of the notification in Form A and accordingly there was no public notice of it as required by sub-s. (2). That is the complaint of the appellants, whose case is that the notification in Form A is mandatory, meaning that in every land-acquisition exercise there must be publication of the notification in Form A. There is no Malaysian authority on the question.

At the s. 4 stage, there has been no decision that any land is needed. The words are "likely to be needed". It is a tentative stage. In fact, it may not even be certain which particular lands in the locality concerned are likely to be needed. This can be seen from the wording of the first paragraph of Form A, which says:

> It is hereby notified that lands in the locality described in the Schedule hereto, including those lands, if any, specified by lot number or by the lot numbers of neighbouring lands, are likely to be needed for the following purpose.

The Schedule merely states the district and mukim or township and gives a description of the locality.

Sections 7 and 8 deal with the stage when it is certain that lands are needed. The lands have been specifically identified. The Land Administrator then, under s. 7, submits to the State Authority a plan and list of the particular lands, or parts thereof, that need to be acquired. And s. 8(1) says:

(1) When the State Authority decides that any of the lands referred to in section 7 are needed for any of the purposes referred to in section 3, a declaration in Form D shall be published in the Gazette.

Such a declaration was gazetted in this case on 18 March 1993.

Two consequences seem to flow from the publication of the preliminary notification in Form A. One consequence is that persons may be authorized by the State Director under s. 5, using Form B, to enter any land affected by the notification to do certain work on it. The first sentence of the second paragraph of Form A gives notice of it. It says: "It is further notified that any person authorized by the State Director in that behalf may enter into any land in such locality in order to examine it and undertake survey operations." The work is "survey operations". What it comprises is listed in Form B. From the list it is apparent that the aim of the work is to ascertain whether the lands are suitable for the purpose for which they are proposed to be acquired and to specifically identify the lands. The result of the work will, I presume, be taken into consideration in deciding whether to acquire the lands in the locality and which lands are to be acquired. This consequence of the publication of the notification in Form A can only be for the benefit of the acquiring authority. If the notification is not published the acquiring authority will be deprived of the power to have survey operations carried out on the land. But they may not need to carry out such survey operations. They may be able to decide exactly which lands are needed and that they are suitable without needing to carry out such survey operations.

The other consequence of the publication of the notification in Form A concerns the market value of the land, that is the value on the basis of which compensation is to be paid. This is a consequence that affects the interests of the landowner. According to para. 1(1)(a) of the First Schedule to the Act, the market value is the market value at the date of publication in the Gazette of the notification in Form A. But that is to be so only if within twelve months a declaration under s. 8 follows. If there is no declaration under s. 8 within twelve months, according to s. 4(3) the Form A notification shall lapse. What happens then? The Act does not say that you must start all over again by gazetting a fresh notification in Form A, although there is power to do so under s. 4(4). The answer is to be found in para. 1(1)(b) of the First Schedule. It says that "in other cases" the market value is the market value at the date of the publication in the Gazette of the declaration under s. 8.

What situations are intended by the words "in other cases"? The obvious situation is, of course, one where the Form A notification is followed by a Form D declaration after twelve months, that is, after the Form A notification has lapsed. In that situation land is validly acquired, and compensation is paid

on the basis of the market value at the date of the gazetting of the declaration in Form D, as if there had been no Form A notification in the first place, it having lapsed. In that situation, as far as the market value is concerned, the Form A notification will have been in vain. It has been a wasteful exercise that could have been done without. If land can be validly acquired in a situation in which the Form A notification is as good as if it had not been made, the Form A notification cannot be mandatory. I will even go one step further and say that for the same reason another situation intended by the words "in other cases" in para. 1(1)(b) of the First Schedule is the situation where no notification in Form A was ever gazetted, and that therefore the Act itself, by implication, does not intend that a Form A notification be mandatory.

There is another angle from which the question may be approached – the angle of the wording of s. 4(1) itself. The requirement that "a notification in Form A shall be published in the Gazette" is dependent on the State Authority being "satisfied that any land in any locality in the State is likely to be needed". Until there is such satisfaction on the part of the State Authority, the notification is not required. "State Authority" is defined in s. 2(1) to mean "the Ruler or the Yang Di-Pertua Negeri of the State". Constitutionally the Ruler, by which I include a reference to the Yang Di-Pertua Negeri as well, acts on the advice of the State Executive Council in matters such as those under the Act, even in arriving at a satisfaction under s. 4(1). In practice the decision to be satisfied will be made by the State Executive Council. Papers will have to be prepared for the consideration of the State Executive Council. But the satisfaction of the State Executive Council will be that of the Ruler only when he acts to indicate his endorsement of or assent to the decision of the State Executive Council.

But the reality of government administration is such that matters might not even reach the stage of the Ruler's satisfaction. The question of acquiring lands in a particular locality may have been studied by officials of the relevant departments with the involvement even of the Menteri Besar (or Chief Minister), without anyone being conscious that he is satisfied that the lands are likely to be needed. Even if those persons are aware of s. 4, the circumstances may be such that it is difficult for them to say that at the administrative level a satisfaction has been reached that the lands are likely to be needed. The question of acquiring the lands might be a controversial one and opinions might differ at that level. Even an independent observer might find it difficult to say that at a particular moment the body of officials or the Menteri Besar are satisfied that the lands are likely to be needed and that they should submit the question to the State Executive Council for its satisfaction and from there to the Ruler for the Ruler's satisfaction. So no steps are taken to obtain the Ruler's satisfaction, and unless and until the Ruler is satisfied that the lands are likely

to be needed, there is no obligation to publish the Form A notification. Then one fine day everyone agrees, without having to have survey operations undertaken, that the lands are needed. Papers are then prepared, not to obtain the State Executive Council's and the Ruler's satisfaction that the lands are likely to be needed, but to obtain their decision under s. 8(1) that the lands are needed. It would be illogical then to also obtain the Ruler's satisfaction under s. 4(1). It would also be pointless to do so because it would result in the gazetting of Form A and Form D on the same day, which would not make any difference in the matter of the consequences of the gazetting of Form A that I have mentioned. As far as the government is concerned, they would not, or no longer, require to have survey operations undertaken because they have already decided to acquire the lands. As far as the landowners are concerned, the market value will be the market value on the date when both Forms A and D are gazetted.

For the reasons that I have given, I am of the view that the publication of a notification in Form A under s. 4(1) is not mandatory and that the failure to publish the notification in this case does not render the acquisition proceedings null and void.

I come now to the question of Form E. It is a form under s. 10 by which the Land Administrator is required to give public notice in the manner prescribed by s. 52 of an inquiry for the hearing of claims to compensation and of the date of the inquiry. Apart from giving public notice, the Land Administrator is also required by s. 11(1) to serve copies of Form E in the manner prescribed by s. 53 upon the occupier of the land affected and upon the registered proprietor of the land, if he is not the occupier, besides certain other persons. According to s. 53(1), service shall be made by delivering or tendering a copy to the person concerned or, if he cannot be found, to any adult member of his family residing with him. Subsections (2) and (3) provide as follows:

> (2) If the person to whom any copy referred to in subsection (1) is delivered or tendered is unwilling or unable to sign the acknowledgement thereof, or if no proper person can be found on whom to effect service, service may be effected by fixing a copy thereof:
>
> (a) upon the outer door of the building in which the person therein named ordinarily dwells or carries on business; and
>
> (b) on any public notice-board in the town, village or mukim in which the person to be served usually resides.
>
> (3) Where the person to be served is the occupier of any scheduled land specified in any notice then, failing personal service, a copy of the notice shall also be posted in some conspicuous part of such land.

It is necessary to state the facts, as revealed by the affidavits, that are relevant to the question of service of Form E and of the consequences in this case of failure to serve it. The appellants claim that they were not served. I begin by stating the facts concerning the address of the appellants.

In para. 7 of his affidavit dated 28 September 1995, the Assistant Land Administrator, District of Seremban, Encik Suhaili bin Ahmad, implied by what he said in that paragraph and by his reference to exh. 'SA3' that the registered address of the appellants as given in the Register of Titles was A27-A28 Batu 4½, Jalan Klang Lama, Kuala Lumpur, but in para. 11 of the said affidavit he said that it was the second to the fifth appellants who resided at and had the same registered address. On a later occasion, in para. 3 of his affidavit dated 20 October 1995, Encik Suhaili expressed his belief that the other four appellants were the family members of the fifth appellant and that they all lived at the same address. None of the appellants denied or disputed Encik Suhaili's belief.

Form E (as also Form F) was issued in respect of each appellant with the Jalan Klang Lama address. It was dated 26 July 1993. It gave 10 September 1993 as the date of the enquiry. A step was taken by Encik Suhaili to effect personal service as required by s. 53(1) on each of the appellants at the Jalan Klang Lama address by sending the five copies of Form E (and of Form F) to the Land Administrator of another district on 29 July 1993 with a request for service because the address was not one in the District of Seremban. But Encik Suhaili, obviously thinking that Jalan Klang Lama was in the District of Kelang, and not realizing that it was in Kuala Lumpur, mistakenly sent the copies of Form E with his letter of request to the Land Administrator of the District of Kelang in the State of Selangor. So on 1 August 1993 the Land Administrator, Kelang, returned the copies of Form E, saying that the address was incomplete and was not in Kelang. Encik Suhaili apparently still did not realize that the address was in Kuala Lumpur, because he did not send the copies of Form E to some proper Land Administrator in Kuala Lumpur for service. Instead he directed the notice server to effect service by fixing a copy of Form E on the fence of the house on the land to be acquired, which was in the Mukim of Labu, District of Seremban. The notice server stated in a statutory declaration that on 30 August 1993 he posted on the land (not on the fence of the house as directed) a notice or form which he did not specify. The statutory declaration bore in its heading a reference to s. 431(1)(b)(c) of the National Land Code, s. 431 being a section concerning methods of service, whereas the proper provision for service of notices under the Act is s. 53 of the Act. Encik Suhaili said that copies of Form E were also affixed on the public noticeboards at the Land Office in Seremban and the Penghulu's Office in Nilai.

If such alternative mode of service was intended to comply with sub-s. (2) of s. 53, it did not. In the first place, sub-s. (2) did not apply because it was neither a case of unwillingness or inability to sign acknowledgement of service nor a case of inability to find a proper person on whom to effect service. As has been seen, there had been no attempt to effect service at the correct address in Jalan Klang Lama, Kuala Lumpur. In the second place, where sub-s. (2) applies, the fixing of the form must be done on the outer door of the building in which the person to be served ordinarily dwells or carries on business or on a public noticeboard in the place in which he usually resides. In this case, the building must be the house in Jalan Klang Lama, Kuala Lumpur, not the house on the land in the Mukim of Labu, and the public noticeboard must be one in the proper sector of Kuala Lumpur, not in Seremban or Nilai. Further, posting a notice on land as required by sub-s. (3), as opposed to fixing a notice on the outer door of building, is to be done when the person to be served is the occupier of the land. In this case, on the evidence, the only appellant that might be argued to be the occupier of the land was the fifth appellant. But even if all the appellants were occupiers of the land, sub-s. (3), by the word "also", is an additional requirement for an occupier, that is, additional to sub-s. (2) and clearly sub-s. (2) had not been complied with.

To make matters worse, the fifth appellant denied that there was any Form E posted on the land. He said that the house on the land, which was a bungalow, was looked after by two workers all the time and that he himself visited it every weekend but he never found any form fixed upon the house. That, by the way, is the evidence on which I said that it might be argued that the fifth appellant was the occupier of the land. One Ramadhan bin Mat, who claimed he was an employee of the fifth appellant, said that he was on the land at all relevant times and also on 30 August 1993, yet he never saw a form being posted on the land and never found any form posted on the land. Encik Suhaili quite naturally said that what the fifth appellant and Ramadhan said were not matters within his knowledge, but there was no affidavit by the notice server to assert, in face of the claims of the fifth appellant and Ramadhan, that he did post the notice on the land and to specify in detail what he actually did on 30 August 1993, so as to flesh out his bare statement in his statutory declaration.

On 10 September 1993 none of the appellants appeared at the inquiry. It was postponed to 7 December 1993. Encik Suhaili sent by post a letter dated 17 November 1993 to each of the appellants at the Jalan Klang Lama address. In para. 11 of his affidavit dated 20 May 1995, the fifth appellant said that he and the first appellant received the letter. The first appellant, however, and the other appellants said that they were informed of the inquiry on 7 December 1993 by the fifth appellant. So all the appellants knew of the date 7 December 1993.

On 7 December 1993 the first and fifth appellants appeared at the inquiry with their counsel, Encik Kirubakaran a/l T. Karthigesu, who was stated in Encik Suhaili's notes of proceedings as "mewakili tuan tanah". The inquiry was postponed at the request of the two appellants to enable them to have a valuation report prepared. On 30 April 1994 Encik Suhaili sent by post a letter to the fifth appellant at the Jalan Klang Lama address informing him of the new date of inquiry, 11 May 1994. Encik Suhaili said in para. 15 of his affidavit dated 28 August 1995 that he sent the notice to the fifth appellant only because the fifth appellant had informed him that he held a power of attorney to act for the other appellants. This was not denied or disputed by any of the appellants. On 11 May 1994 none of the appellants was present. On 14 June 1994 Encik Suhaili sent to Tetuan Kiru and Yong a letter informing them of the new date of inquiry, 20 June 1994. On that date, according to Encik Suhaili in para. 15 of the said affidavit, "pemohon serta peguam mereka" attended. There was no valuation report from the appellants even though, six months earlier, on 7 December 1993, the inquiry had been postponed to enable the appellants to have a valuation report prepared. The inquiry proceeded on 20 June 1994, when Encik Suhaili made his award of compensation. The appellants subsequently made objection to the High Court to the amount of compensation. The objection was dismissed on 12 February 2001. According to the learned State Legal Adviser the appellants did not take the matter further on appeal.

From those facts there can be no doubt that there was failure to serve From E on the appellants as required by s. 11(1). The whole attempt at service was characterized by failure to notice that the address for service was in Kuala Lumpur and failure to understand sub-s. (2) of s. 53. Further, the purported service by the notice server on the land is at best open to question. But there was no bad faith. There was no intention to hold an inquiry without giving the appellants a right to be heard. The postponements prove the contrary. Neither did the failure to serve Form E prejudice the appellants or result in any form of injustice to them. The purpose of Form E and of the method of service provided by s. 53 is solely to make sure that the persons concerned know of the inquiry and of the date thereof so that they will have an opportunity to attend and be heard if they so wish. In this case the evidence shows that the appellants knew of the date, that the fifth appellant represented the other appellants and that counsel represented all the appellants, and that therefore the inquiry was conducted with the presence of the appellants. They even had six months within which to have a valuation report prepared.

As to the consequences of a mere failure to serve Form E, I have no doubt that it is capable of rendering the inquiry and the decision made thereat null and void, but I seriously doubt that it is capable of rendering the entire acquisition null and void. The only case of the cases cited or presented in the

appeal that decided that failure to serve Form E invalidated the acquisition is *Wong Kee Sing Realty Sdn Bhd & Ors v. The Collector of Land Revenue, District of Gombak* [1995] 1 LNS 363. Mahadev Shankar J dealt with the question in paras. 56 to 61 of his judgment, but I fail to see how, from his view expressed in para. 56 that "the proviso to s. 11 clearly implies that a failure to serve a registered proprietor who is also the occupier of the land shall invalidate the enquiry", he, after citing certain statements in three cases, came to the conclusion in para. 62 that "so far as these lots were concerned, the total failure to effect service invalidated the acquisition". The cases referred to were *Ketua Pengarah Kastam v. Ho Kwan Seng* [1997] 2 MLJ 152, *Lai Tai v. The Collector of Land Revenue* [1960] 2 MLJ 83 and *Re Application of Tan Oon & Ors* [1985] 1 MLJ 67, but in none of those cases did the question of invalidating an acquisition arise or was there a ruling that the result of failure to serve Form E invalidates an acquisition.

But even if mere failure to serve Form E is capable of invalidating an acquisition, in my judgment the failure to serve Form E in this case cannot provide justification for holding that the proceedings for the acquisition of the appellants' land are null and void. The failure in this case did not prejudice the appellants in any way since they were able to take part in the inquiry and did take part in it with not a whit less advantage than if they had been served with Form E. The failure in this case cannot even be held to nullify the inquiry.

I have come to that conclusion without having to turn for aid to s. 56, as to the application of which a question arose in the appeal. The section provides as follows:

> No omission or failure to make due publication of a notice or to make due service upon persons and parties interested as provided in this Part shall invalidate any proceedings under this Act.

In para. 58 of his judgment in *Wong Kee Sing, supra*, Mahadev Shankar J said:

> In my view a "failure to make due service" cannot be equated to a total failure to make any service at all. This is not a situation of nought equals nought, but rather a situation of making service, in a manner not provided for section 53, an irregularity rather than a nullity.

I seriously doubt the correctness of the significance given to the word "due" as distinguishing service in a wrong manner from total failure of service. The term "due service" could mean service in the proper manner or service that is due to the person who has to be served. A person who has not been served at all may quite properly complain that he has not been duly served or he has not had due service. Assuming that in a particular case there has been no "due service" and assuming that the words "any proceedings" in the section include

the entire acquisition and not just the proceedings to which the notice of which there has been failure to serve relates, the question arises as to the scope of s. 56, that is to say, whether it applies in all cases and circumstances of omission or failure to serve, even, for example, where no Form E was issued or no attempt at all has been made to serve it. To my mind s. 56 must be given effect to, at least in certain circumstances, as otherwise it serves no purpose. Whatever may be the circumstances in which it ought not be given effect to, to my mind the present case, assuming that there has been no "due service", is certainly a case, in view of all the circumstances that I have set out, where s. 56 ought to apply, so that the failure to serve Form E on the appellants does not invalidate the acquisition. But as I have said, the decision that I have arrived at in this appeal has been arrived at without resorting to s. 56.

I would dismiss this appeal with costs.

Azmel Maamor J:

I have read the judgments of both my learned brothers Gopal Sri Ram and Abdul Aziz Mohamad in drafts. After having carefully considered them in the light of the facts and circumstances of this case, I concur with the decision by my learned brother Abdul Aziz and I also agree with his grounds in arriving at that decision. I am fully satisfied that no prejudices had been actually caused to the appellants. This is not a case where the landowners had been completely deprived from attending the hearing before the Assistant Land Administrator. They were present and/or represented by their counsel. In fact they had been given the opportunity to submit their valuation report. However they chose not to produce it. Neither was this a case where the landowner had been deprived of any compensation by the Assistant Land Administrator. Nor was there any evidence shown that the compensation awarded to them was less favourable than those other neighbouring land owners. In other words their presence at the hearing had nullified any irregularities that might have existed before that. After having considered all the circumstances of this case I came to the conclusion that the award made by the Assistant Land Administrator on 20 June 1994 was perfectly lawful and the amount appropriate. And the learned High Court Judge was correct in not disturbing the said award.

In the circumstances I would agree that this appeal be dismissed with costs.